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No. ———

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

JON CARY MAIER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals violated the "clearly erroneous" standard of Fed.R.Civ.P. 52(a) when, based only on direct testimony and contrary to evidence adduced via cross examination, it overturned the factual finding by the Magistrate and the District Court that Defendant's truck was not impounded pursuant to standard Minneapolis Police procedures.

II. Whether a post impoundment inventory search of a vehicle which did not comport with the standard impoundment procedures of the local police is violative of the Fourth Amendment.

III. Whether a full, nonconsensual, warrantless search of an illegally parked camper-truck is justified when there is present an unlicensed responsible adult who can arrange for removal of the camper-truck or its contents, or who can otherwise relieve police of liability for property claims.

TABLE OF CONTENTS

Page

Table of Authorities ii

Questions Presented For Review iv

Reports Of Opinions Delivered In The Courts Below .. v

Jurisdictional Statement v

Relevant Constitutional Provisions And Regulations . v

State Of The Case 1

Argument

I. The Court of Appeals violated the clearly erroneous standard of Fed. R. Civ. P. 52(a) when, based only on direct testimony and contrary to evidence adduced via cross examination, it overturned the finding by the magistrate and district court that the Minneapolis police impoundment procedures were not followed in the instant case. 8

II. Under South Dakota v. Opperman, 428 U.S. 364 (1976), the police violated defendant's constitutional rights by conducting an inventory search of his vehicle which did not comport with the standard Minneapolis police impoundment procedures. 16

III. In light of the particular facts and circumstances of the case, a full, nonconsensual, warrantless search after impound of the camper-truck was unreasonable in scope and unconstitutional. 20

Conclusion 27

APPENDIX INDEX

Opinion of the Eighth Circuit Court of Appeals reversing the Order of the District Court A-1

Memorandum Order of the District Court granting Defendant's Motion to Suppress Evidence B-1

Report and Recommendation of Magistrate C-1

TABLE OF AUTHORITIES

Cases:

Booker v. Special School Dist. No. 1, Minneapolis, Minn., 585 F.2d 347, *cert. denied* 443 U.S. 915 (8th Cir. 1978) 11
Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975) 10
Cady v. Dombrowski, 413 U.S. 433 (1973) 14, 18
Cardwell v. Lewis, 417 U.S. 583 (1974) 22
Dombrowski v. Cady, 471 F.2d 280 (7th Cir. 1972), *rev'd* 413 U.S. 433 (1973) 14
Ferrero v. United States, 603 F.2d 510 (5th Cir. 1979) 12
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), *rev'd in part on other grounds*, 339 U.S. 605 (1950) 10
International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980) 11
Jackson v. U.S. Steel Corp., 624 F.2d 436 (3rd Cir. 1980) 12
Jacobs v. City of New Orleans, 484 F.2d 24 (5th Cir. 1973) 10
Jones v. United States, 362 U.S. 257 (1960) 27
Kansas City Stockyards Co. of Maine v. Anderson, 199 F.2d 91 (8th Cir. 1952) 11
Layne-Minnesota p.r., Inc. v. Singer Co., 574 F.2d 429 (8th Cir. 1978) 11, 15
Norm Thompson Outfitters, Inc. v. General Motors Corp., 448 F.2d 1293 (9th Cir. 1971) 12, 14, 15
Pickens-Bond Constr. Co. v. United Broth. of Carpenters and Joiners of America, Local 690, 586 F.2d 1234 (8th Cir. 1978) 11
Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982) .. 10
Rakas v. Illinois, 439 U.S. 128 (1978) 27
Sam Miller Bag Co. v. Burlington Northern, Inc., 641 F.2d 607 (8th Cir. 1981) 11
Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 361 F.2d 336 (9th Cir. 1966) 11
South Dakota v. Opperman, 428 U.S. 364 (1976) 8, 9, 16, 17, 18, 20, 21, 22, 24, 25

State v. Hudson, 390 A.2d 509 (Me. 1978) 18-19
State v. Jewell, 338 So.2d 633 (La. 1976) 18, 20
Terry v. Ohio, 392 U.S. 1 (1968) 21
United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc., 568 F.2d 599 (8th Cir. 1978) 11, 15
United States v. Chadwick, 433 U.S. 1 (1977) .....
.....20, 22, 23, 24
United States v. Dochterman, 603 F.2d 652 (8th Cir. 1980) 10
United States v. Edwards, 577 F.2d 883 (5th Cir.) (en banc) *cert. denied*, 439 U.S. 968 (1978) 21
United States v. Hellman, 556 F.2d 442 (9th Cir. 1977) 18, 19
United States v. Hughes, 635 F.2d 449 (5th Cir. 1981) 10
United States v. Jackson, 529 F.Supp. 1047 (D. Md. 1981) 18
United States v. Johnson, 570 F.2d 836 (8th Cir. 1978) 10
United States v. Maier, 691 F.2d 421 (8th Cir. 1982) 7, 9, 19, 22
United States v. Munz, 352 F.2d 196 (9th Cir. 1965) 15
United States v. Wilson, 636 F.2d 1161 (8th Cir. 1980) 7, 13, 21, 23, 26, 27
United States v. Yellow Cab Company, 338 U.S. 338 (1949) 11
Washington v. Watkins, 566 F.2d 1346 (5th Cir. 1981) *cert. denied*, 102 S.Ct. 2021 (1982) 10
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 12, 15

Secondary Authorities:

U.S. CONST. Amend. IV .....v, 20
18 U.S.C. Section 3231 5
21 U.S.C. Section 841 5
28 U.S.C. Section 636(b) (1) 7, 14
28 U.S.C. Section 1254 v
Fed.R.Civ.P. 52(a) .....iv, v, 8, 9
Fed.R.Crim.P. 18 15
II LaFave, *Search and Seizure:* A Treatise on the Fourth Amendment, Section 7.2 pp. 540-41 (1978 and Supp. 1980) 23

QUESTIONS PRESENTED FOR REVIEW

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 691 F.2d 421 (8th Cir. 1982) and is attached hereto as Appendix 1. The Order of the United States District Court, District of Minnesota, 3-81CR.83, is unreported, but attached hereto as Appendix 2. The Report and Recommendation of the United States Magistrate is attached hereto as Appendix 3.

JURISDICTIONAL STATEMENT

On October 27, 1982, the United States Court of Appeals for the Eighth Circuit filed its opinion in the instant case reversing the District Court's Order suppressing evidence. On December 7, 1982, the United States Court of Appeals for the Eighth Circuit entered its Order denying Defendant's Petition for Rehearing. 28 U.S.C. Section 1254 confers on this Court jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS AND REGULATIONS

(1) U.S. CONST. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

(2) Fed.R.Civ.P. 52(a):

Findings by the Court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

On September 10, 1981, at approximately 2:00 a.m., Minneapolis police officers Myron Rognlie and Michael Carey received a call to check a "slumper," or party sleeping in a vehicle parked at 330 East 46th Street, Minneapolis, Minnesota (T./[1] 5-6). When they arrived the officers found a pickup truck parked with its right-hand front and rear wheels on the sidewalk (T. 6). The box of this pickup was covered by a "topper," or shell camper, so that the rear portion of the truck was fully enclosed (T. 11). This entire rear portion was divided into two separate, locked com-

[1] "T" refers to transcript of hearing of pretrial motions held before Magistrate Brian P. Short on October 26, 1981.

partments. The normal tail section of the pickup was covered by a large sheet of plywood, approximately 4 feet by 8 feet in dimension (T. 13, 15). This piece of plywood rendered the normal tail section of the truck an enclosed, concealed box twelve to eighteen inches in height (T. 33). In order to gain access to this concealed compartment, it was necessary to unlock the tailgate and pull it down (T. 14). Secondly, the fiberglass "shell camper" attached on top of the tail section created an upper compartment which reached in height to the top of the cab (T. 11). This camper top had a window at the back (T. 29) and could be opened by unlocking and flipping up its hinged back section (T. 13-14). The large sheet of plywood board served as the floor of this upper locked compartment (T. 14).

When the officers approached the truck they found the Petitioner, Mr. Maier, asleep in the driver's seat (T. 6). The officers woke Mr. Maier, and in response to their questions he identified himself and gave his address and date of birth (T. 6). Officer Carey ran a driver's license check and a warrant check (T. 6). He discovered that Mr. Maier was clear of any warrants but that his driver's license was under suspension (T. 7). The officers also determined that the truck was not stolen (T. 26, Magistrate's Findings of Fact No. 6).

The officers instructed Mr. Maier to get out of the cab of the truck, and told him that because his license was under suspension they were not going to let him drive the vehicle away (T. 7). They did not afford Mr. Maier the opportunity to make arrangements to have the vehicle removed by calling a licensed driver who could remove it from its illegally parked location (T. 32). Officer Rognlie

frisked Mr. Maier for weapons, found none, and instructed him to leave the scene (T. 7, 19; Magistrate's Finding No. 7). The officers took the keys for the truck, gave Mr. Maier his remaining keys, and sent him on his way (T. 7). Throughout this incident, Mr. Maier made no threatening remarks or jestures toward the officers (T. 19), and the officers never saw any movement in the vehicle which would have suggested the presence of someone else (T. 34). While the officers could have ticketed the truck and left it where it was, (T. 22-23), they decided instead to search the vehicle (T. 8). The officers never issued a citation on the truck for illegal parking (T. 22).

After Mr. Maier began walking away from the scene, the officers commenced their search (T. 8). Mr. Maier had not consented to this procedure, and the officers did not afford him the option of relieving the police department from liability for claims (T. 31-32). Officer Rognlie entered and searched the unlocked cab compartment of the vehicle. He saw nothing in plain view which appeared to be contraband (T. 30). He did discover in the cab a leather pouch, and he yelled down the street to Mr. Maier, "Is this your purse?" (T. 21) Mr. Maier called back that he had no "purse" (T. 21). Officer Rognlie then found a second pouch which contained large amounts of currency (T. 9). After finding this money, he ran after Mr. Maier and found him down the street (T. 9). Again, Mr. Maier denied ownership of any "purse" (T. 21), and stated that he had been using the truck for the previous five months, but that it belonged to a friend (T. 10). Officer Rognlie ordered Mr. Maier to accompany him back to the truck, and the two men walked back to the scene (T. 10).

Officer Rognlie immediately placed Mr. Maier in the

rear of the squad car and returned to his partner (T. 11). Meanwhile. Officer Carey had already moved to the rear of the truck. Looking through the window of the camper top, he saw only some sleeping bags and what appeared to be a rake and a cyclone fence (T. 29). Nonetheless, without consent, exigent circumstances or a search warrant, Officer Carey unlocked and opened the camper top compartment with a key he had found on the front seat of the truck (Affidavit in Support of Search Warrant; T. 11).

Upon opening the camper top, Officer Carey asked Officer Rognlie to "come over here" (T. 11). Officer Rognlie did so, and later testified that he detected the smell of what he believed was marijuana coming from the rear of the vehicle (T. 12). However, Officer Rognlie admitted in his testimony that he has never served on the Minneapolis Narcotics Squad and has no training in narcotics (T. 27-28), and he could not describe the smell of unburned marijuana or articulate why the smell he noticed in the truck was that of unburned marijuana (T. 28; Magistrate's Finding No. 19). After the warrantless search of the camper top portion of the truck, the officers unlocked the truck's tailgate so as to gain access to the concealed compartment below the sheet of plywood (T. 12-13; Magistrate's Finding No. 19; Affidavit in Support of Application for Search Warrant). Under the sheet of plywood, the officers found several sealed, opaque, plastic bags, one of which Officer Rognlie squeezed (T. 13, 15). The officers then returned to their squad car, advised Mr. Maier that he was under arrest for "probable cause, narcotics," and called for a narcotics investigator (Magistrate's Finding No. 20).

When Sgt. John J. Boulger, a Minneapolis Narcotics Officer, arrived, Officers Rognlie and Carey explained to

him what they had found and how they had come upon it (T. 41; Magistrate's Finding No. 21). Sgt. Boulger prepared an affidavit in support of an application for a search warrant based solely on the information received from Officers Rognlie and Carey (T. 42; Magistrate's Finding No. 22). The search warrant was issued by Hennepin County Municipal Court Judge Kenneth Gill, and a search pursuant to this warrant revealed a quantity of suspected marijuana in the plastic bags within the camper compartment of the vehicle. (T. 39; Magistrate's Finding No. 24). On the same day, Mr. Maier was charged by complaint with possession with intent to distribute marijuana in violation of 21 U.S.C. Section 841. Federal jurisdiction in the United States District Court for the District of Minnesota was based on 18 U.S.C. Section 3231 and Fed.R.Crim.P. 18.

On October 28, 1981, the Defendant brought on for hearing before Magistrate Brian Short a motion to suppress all evidence obtained as a result of the search and seizure of the vehicle. During the hearing on this motion, Officer Rognlie claimed for the first time that the rear portion of the truck had been searched out of a concern for his personal safety. (T. 11). In the report which he prepared the night of the incident, Officer Rognlie made no mention of this alleged concern for police protection (T. 18), and he made no supplementary report which spoke of police safety as grounds for searching the rear of the vehicle (T. 34). Because the space under the plywood sheet was only twelve to eighteen inches in height, nothing unusual had been observed during the course of the search, the defendant was not carrying any weapons, and the truck was not stolen. the Magistrate concluded that Officer Rognlie's alleged fear

for his safety was not reasonable (Magistrate's Report, page 5).

Officer Rognlie also claimed at the hearing that the search was an inventory search after impoundment conducted in accordance with normal police procedure (T. 8), and that the truck was impounded because it was parked on the sidewalk (T. 22). This claim was contradicted by the police report, which set forth that the rationale for impounding was the finding of the alleged marijuana (T. 23). Further, Officer Rognlie's cross examination revealed that, contrary to police regulations: the impound report was not completed (T. 21) and/or filed (T. 22); no citation was issued for the illegal parking which formed the alleged basis for the impound (T. 22-23); he had no knowledge of the standards for impounding a vehicle (T. 24) or the standards for not impounding a vehicle (T. 25); the police inventory form regarding the contents of the vehicle had not been completed (T. 26-27); Minneapolis Police Form 6007, otherwise known as a tow-sheet, was not completed prior to the impounding of the vehicle (T. 44); the vehicle identification number was not checked through the Police Auto Unit prior to impounding (T. 26, 44); and Mr. Maier was not afforded the opportunity to provide for the prompt removal of the vehicle before the officers commenced searching it (T. 32, 41).

After hearing the testimony of Officer Rognlie and Sgt. Boulger, the Magistrate concluded that the established Minneapolis Police Department procedures for impoundment of a vehicle had not been followed in the instant case (Magistrate's Finding No. 9), and recommended that the trial court grant Defendant's motion for an Order suppressing certain physical evidence, including all of the al-

leged marijuana found by the police (*See* Appendix 3, Magistrate's Report and Recommendation.) The Government objected to the Magistrate's findings that standard procedures had not been followed, that Officer Rognlie's alleged fear for police safety was unreasonable, and that the officers' belief that they detected the smell of unburned marijuana was unreasonable. (Government's Memorandum of Objections to the Magistrate's Report and Recommendations).

The district court conducted a *de novo* review pursuant to 28 U.S.C. Section 636(b) (1) and embraced all but one of the Magistrate's findings. Specifically, the court concluded that established procedures for impoundment of a vehicle had not been followed and that Officer Rognlie's alleged fear for his safety was not reasonable (*see* Appendix 2). The Court accepted the Magistrate's recommendation to suppress the physical evidence seized pursuant to the search of the vehicle. District Court Judge Alsop found no facts in the instant case to adequately distinguish it from *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980), in which the Eighth Circuit Court of Appeals held that "[t]he routine search of a locked automobile trunk is unreasonable under the Fourth Amendment." 636 F.2d at 1165. (*See* Appendix 2, p. 2.)

On appeal, the United States Court of Appeals for the Eight Circuit reversed and remanded, *United States v. Maier*, 691 F.2d 421 (8th Cir. 1982), concluding that the facts in the instant case were quite different from those presented in *Wilson*. *Id.* at 423. Moreover, in the court of appeals' view, "the record demonstrates that the initiation of the search into the vehicle was in conformity with the usual practice for inventory searches of a vehicle to be

impounded," *Id.* at 424-25 n. 2, so that the warrantless search was justified under *South Dakota v. Opperman*, 428 U.S. 364 (1967). It is from this decision of the court of appeals that the instant petition arises.

ARGUMENT

I.

THE COURT OF APPEALS VIOLATED THE CLEARLY ERRONEOUS STANDARD OF FED. R. CIV. P. 52(a) WHEN, BASED ONLY ON DIRECT TESTIMONY AND CONTRARY TO EVIDENCE ADDUCED VIA CROSS EXAMINATION, IT OVERTURNED THE FINDING BY THE MAGISTRATE AND DISTRICT COURT THAT THE MINNEAPOLIS POLICE IMPOUNDMENT PROCEDURES WERE NOT FOLLOWED IN THE INSTANT CASE.

In recommending the suppression of the physical evidence seized pursuant to the search of the truck driven by Mr. Maier, Magistrate Brian Short made a factual finding that the established Minneapolis Police Department procedures for impoundment of a vehicle had not been followed. Magistrate's Finding No. 9. After *de novo* review, the district court adopted this finding. *See* Appendix 2. In reversing the decision of the district court, the United States Court of Appeals for the Eighth Circuit "disagreed" with this factual finding:

> Although Maier argues that the police did not comply with requirements of the Minneapolis ordinances for an inventory search, and the magistrate made findings consistent with Maier's contention, *we disagree with that conclusion.* . . . [T]he record demonstrates that the initiation of the search into the vehicle was

> in conformity with the usual practice for inventory searches of a vehicle to be impounded.

United States v. Maier, 691 F.2d 421, 424-25 n. 2 (8th Cir. 1982) (emphasis added). Interpreting *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Eighth Circuit correctly concluded that "once a vehicle is seized and *legitimately taken into police custody*, the *routine* practice of securing and inventorying its contents is justified . . . ." 691 F.2d at 423 (emphasis added). By setting aside the finding of the Magistrate and district court that standard impoundment procedures had not been followed, the court of appeals was able to reconcile the search of the vehicle in the instant case with its reading of *Opperman*. The Eighth Circuit concluded that "*we are satisfied* from our examination of the record that the police entered the locked camper while conducting an appropriate inventory search," 691 F.2d at 423 n. 1 (emphasis added), and supported this conclusion by including in its opinion a lengthy quotation from the direct testimony of Officer Rognlie. *Id.* at 424-25 n. 2.

A court of appeals is not empowered to overturn factual findings simply because it "disagrees" with the trial court, or because it is "satisfied" from its own examination of the record that there is evidence supporting a conclusion contrary to that reached by the trial court.

According to Rule 52(a) of the Federal Rules:

> Findings of fact [by a federal district court] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Fed.R.Civ.P. 52(a).

Rule 52(a) has been extended to measure appellate review applicable to a trial judge's factual determination in a criminal case. *United States v. Hughes*, 635 F.2d 449, 453 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1353 (5th Cir. 1981) *cert. denied* 102 S.Ct. 2021 (1982); *United States v. Dochterman*, 630 F.2d 652, 653 (8th Cir. 1980); *United States v. Johnson*, 570 F.2d 836, 838 (8th Cir. 1978). This rule does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Nor does the rule divide facts into categories. *Id.* A trial court's findings with respect to police officers' conduct and adherence to regulations are factual findings to which the "clearly erroneous" standard applies for purposes of review. *See, Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975); *Jacobs v. City of New Orleans*, 484 F.2d 24 (5th Cir. 1973).

As this Court long ago established, the dictates of Rule 52(a) that findings of fact not be set aside unless clearly erroneous and that due regard be given to the opportunity of the trial court to judge of the credibility of witnesses, require that the appellate court make allowances for the advantages possessed by the trial court in appraising the significance of conflicting testimony. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949), *rev'd in part on other grounds*, 339 U.S. 605 (1950). Where there is evidence which would support either of two conflicting conclusions, but the trial court has decided to weigh evidence more heavily for defendants, such a choice between two permissible views of the weight of the evi-

dence is not "clearly erroneous." *United States v. Yellow Cab Company*, 338 U.S. 338 (1949); *Pickens-Bond Const. Co. v. United Broth. of Carpenters and Joiners of America, Local 690*, 586 F.2d 1234 (8th Cir. 1978); *accord, Booker v. Special School Dist. No. 1, Minneapolis, Minn.*, 585 F.2d 347, *cert. denied* 443 U.S. 915 (8th Cir. 1978); *Sam Miller Bag Co. v. Burlington Northern, Inc.*, 641 F.2d 607 (8th Cir. 1981). This principle reflects an appellate court's obligation to construe the evidence in a light most favorable to the appellee in determining whether the district court's findings were clearly erroneous. *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599 (8th Cir. 1978); *accord, Kansas City Stockyards Co. of Maine v. Anderson*, 199 F.2d 91 (8th Cir. 1952); *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.*, 361 F.2d 336 (9th Cir. 1966).

The Court of Appeals for the Eighth Circuit itself has noted that a court of appeals must accept the factual findings of a trial court unless these findings are clearly erroneous, based upon a review of the *entire record. Layne-Minnesota p.r., Inc. v. Singer Co.*, 574 F.2d 429 (8th Cir. 1978). Nevertheless, without even citing the conflicting "substantial evidence" within the forty-eight page record on which the Magistrate and district court had relied, the Eighth Circuit overturned their mutual finding that the officers had not followed established Minneapolis Police Department impoundment procedures. The Eight Circuit did not assert that the finding was clearly erroneous, or that the court was left with the definite and firm conviction that a mistake had been committed by the trial court. *See, e.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), *cert. denied* 449

U.S. 1063 (1980); *Jackson v. U.S. Steel Corp.*, 624 F.2d 436 (3rd Cir. 1980); *Ferrero v. United States*, 603 F.2d 510 (5th Cir. 1979). Rather, the Eighth Circuit simply "disagreed" with the trial court's conclusion. 691 F.2d at 424 n. 2.

It is not a function of a court of appeals to decide factual issues *de novo. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d 1293 (9th Cir. 1971), the Ninth Circuit noted

> the severe limitations imposed on an appellate court in reviewing findings of fact . . . . It is not our function to reevaluate the evidence below . . . . Our task, rather, is to determine *if there exists evidence of substance* to support the findings of fact of the trial court . . . .

Id. at 1294-95 (emphasis added). In the instant case, the forty-eight page record of the hearing before Magistrate Short is replete with evidence which supports the finding by the Magistrate and district court. While the Eighth Circuit pretended that Officer Rognlie's testimony established that normal police procedure had been followed in impounding the truck, on cross examination he admitted he did not know what the police standards were for determining when to impound a vehicle (T. 24) or when *not* to impound (T. 25), or even what procedures should be followed before ordering an impound (T. 25).

Had Officer Ronglie been familiar with the Minneapolis Police Department Manual's standards for impounding and not impounding vehicles, he would have known that the vehicle driven by Mr. Maier should not have been impounded. *See* the 6-800 Series of the Manual which ad-

dresses impound procedures and was introduced as Government's Exhibit 1.

As the record and the Magistrate's Findings of Fact reflect, the officers were informed that Mr. Maier had been using his friend's truck for the previous five months (T. 10), Mr. Maier was clear of any warrants (T. 7), and the truck was not stolen (T. 26, Magistrate's Finding No. 6). Under the circumstances, proper police procedures dictated that Mr. Maier be afforded an opportunity to arrange for the prompt removal of the truck from its improperly parked location. Further, under *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980), the police should have at least inquired whether Mr. Maier would relieve them of liability for claims, thus obviating the need for a search even *if* the vehicle was seized. *Id.* at 1165.

Officer Rognlie's cross examination also revealed that, contrary to the dictates of the Minneapolis Police Department Manual, the vehicle identification number was not checked through the Police Auto Unit prior to impounding (Government's Exhibit 1, section 6-803); Minneapolis Police Form 6007, otherwise known as a tow-sheet, was not completed prior to the impounding of the vehicle (*Id.*); the police inventory form (Form 6008) regarding the contents of the vehicle was never completed (Government's Exhibit 1. section 6-811); and an impound report had not been completed and/or filed as required (Government's Exhibit 1, section 6-806). Moreover, while Officer Rognlie claimed at one point that the truck was impounded because it was parked on the sidewalk (T. 22), he later admitted that the rationale for impounding which the officers set forth in the police report was the finding of the alleged marijuana (T. 23). He also admitted that no citation ever wes issued for illegal parking (T. 22-23).

Having had the opportunity to examine the relevant portion of the Minneapolis Police Department Manual and to hear the witnesses and judge their credibility, the Magistrate found that the established Minneapolis Police Department procedures for impoundment of a vehicle were not followed. Magistrate's Finding No. 9. The Government objected to this finding, but the district court, after its *de novo* review pursuant to 28 U.S.C. Section 636(b)(1), embraced the Magistrate's determination. While it is beyond question that "there exists evidence of substance to support the findings of fact of the trial court," *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d at 1294-95, the Eighth Circuit apparently ignored this evidence.

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), as in the case at bar, the Court of Appeals for the Seventh Circuit simply overturned factual findings of a district court without any showing that said findings were clearly erroneous. *Dombrowski v. Cady*, 471 F.2d 280, 283 (7th Cir. 1972), *rev'd*, 413 U.S. 433 (1973). As this Court stated in reversing the Seventh Circuit's decision:

> While that Court [of Appeals] was obligated to exercise its independent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. . . . We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

413 U.S. at 443.

The Eighth Circuit Court of Appeals should not be free simply to disregard the district court's findings of fact.

When, as in the instant case, there is evidence of substance to support a particular finding, the court of appeals is obligated to accept it. *Norm Thompson Outfitters, supra.* "If, on the other hand, such finding of fact is 'clearly erroneous,' it is the *duty* of this court [of appeals] *to so declare.*" *United States v. Munz,* 352 F.2d 196, 198 (9th Cir. 1965) (emphasis added). In the instant case, as in *Cady,* the court of appeals failed to do either.

It is apparent that the Eighth Circuit abused its authority in reviewing the district court's decision by failing to review the entire record before it, *Layne-Minnesota p.r., Inc. v. Singer Company,* 574 F.2d 429 (8th Cir. 1978), by failing to construe the evidence within the record in the light most favorable to the appellee, *United Barge Company v. Notre Dame Fleeting & Towing Service, Inc.,* 568 F.2d 599 (8th Cir. 1978), and by deciding the factual issues in this case *de novo, Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969). This Court should state with precision the duties and obligations of the courts of appeals with respect to their review of factual findings, and should reinstate the factual finding by the Magistrate and district court that the Minneapolis Police Department standard impoundment procedures were not followed in the instant case.

II.

UNDER *SOUTH DAKOTA V. OPPERMAN*, 428 U.S. 364 (1976), THE POLICE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS BY CONDUCTING AN INVENTORY SEARCH OF HIS VEHICLE WHICH DID NOT COMPORT WITH THE STANDARD MINNEAPOLIS POLICE IMPOUNDMENT PROCEDURES.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court made clear throughout its opinion that the law of that case applies only after a proper impoundment procedure has occurred in accordance with standard procedures in the local police department.

> At the officer's direction, the car door was then unlocked and, using a standard inventory form *pursuant to standard police procedures*, the officer inventoried the contents of the car . . . . 428 U.S. at 366 (emphasis added).
>
> * * *
>
> The decisions of this Court point unmistakenly to the conclusion reached by both federal and state courts that inventories *pursuant to standard police procedures* are reasonable. *Id.* at 372 (emphasis added).
>
> * * *
>
> In applying the reasonableness standard [of the Fourth Amendment] adopted by the Framers, this Court has consistently sustained police intrusions into automobiles *impounded or otherwise in lawful police custody* where the process is aimed at securing or protecting the car and its contents. *Id.* at 373 (emphasis added).
>
> * * *
>
> The Court carefully noted that the protective search [in *Cady v. Dombrowski*, 413 U.S. 433 (1973)] was

> carried out in accordance with *standard procedures* in the local police department, . . . a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. *Id.* at 375 (emphasis in original; emphasis added).

Finally, Mr. Chief Justice Burger stated that:

> On this record we conclude that *in following standard police procedures,* . . . the conduct of the police was not "unreasonable" under the Fourth Amendment. *Id.* at 376 (emphasis added).

In his concurring opinion in *Opperman,* Mr. Justice Powell went to great lengths in stressing the importance of adherence to standard local police impoundment procedures:

> As the Court's opinion *emphasizes,* the search here was limited to an inventory of the unoccupied automobile and was conducted *strictly in accord with the regulations of the Vermillion Police Department.* 428 U.S. at 380 (emphasis added).
>
> * * *
>
> I agree with the Court that the Constitution permits *routine inventory searches* . . . . *Id.* (emphasis added).

In distinguishing proper inventory searches from those searches which require a warrant, Mr. Justice Powell noted:

> Inventory searches are *conducted in accordance with established police department rule or policy* and occur whenever an automobile is seized. *Id.* at 383 (emphasis added).

Strict adherence to local police impoundment procedures ensures the validity of warrantless inventory searches in a number of ways. If all inventory searches in a particular locale are conducted in strict compliance with established police department policy, there is little danger that any particular inventory search will in fact be conducted as a subterfuge for criminal investigation so as to avoid the more stringent requirements which apply to criminal investigative searches. *Opperman*, 428 U.S. at 376. Further, uniform adherence to proper department standards for inventory searches prevents hindsight from affecting the judicial evaluation of the reasonableness of any particular search. If a search has been conducted in strict accordance with standard police department procedures and yields incriminating evidence valuable in a subsequent criminal proceeding, there is little risk that the criminal court will be faced with a "hindsight justification" for the search. *Id.* at 383 (Powell, concurring). Finally, adherence to standard procedures tends to ensure that police officers will limit the scope of their inventory searches to the extent necessary to carry out their "community caretaking functions," *Opperman*, 428 U.S. at 375; *see, Cady v. Dombrowski*, 413 U.S. at 441, and it is these caretaking functions which justify warrantless intrusions by the police department. *Opperman*, 428 U.S. at 369-71.

In both federal and state courts, inventory searches have been invalidated because they were not conducted pursuant to standard impoundment procedures of the respective local police departments. *See, e.g., United States v. Hellman*, 556 F.2d 442, 444 (9th Cir. 1977); *United States v. Jackson*, 529 F.Supp. 1047, 1055 (D. Md. 1981); *State v. Jewell*, 338 So.2d 633, 639 (La. 1976); *State v. Hudson*,

390 A.2d 509, 511 (Me. 1978) (remanded to allow proof that inventory was carried out pursuant to standard local practice). In *Hellman*, the government contended that it was enough that an inventory practice was a routine part of impoundment procedures in most police departments throughout the country, but the Ninth Circuit disagreed:

> The fact that other police departments routinely follow such a practice may give support to the proposition that such a practice, if locally followed, is reasonable. It does not, however, render reasonable a search where the inventorying practice is not locally followed and the search, thus, is a departure from local practice. A locally followed practice gives some assurance that the particular car was not singled out for special searching attention.

United States v. Hellman, 556 F.2d at 444.

In the instant case, the Magistrate and district court properly concluded that the established Minneapolis Police Department procedures for impoundment of a vehicle were not followed. (Magistrate's Finding No. 9; *see* Appendices 1 and 2; *see* Argument I above.) While the court of appeals "disagreed" with this conclusion, *United States v. Maier*, 691 F.2d at 424 n. 2, its opinion suggests that the Eighth Circuit did not properly consider the cross examination of the officers or the specific Minneapolis Police Department policies (*see* Government's Exhibit 1) regarding impoundment. Under *Opperman*, the search of the truck driven by Mr. Maier violated the Fourth Amendment, and the evidence discovered in the course of that search should be suppressed.

III.

IN LIGHT OF THE PARTICULAR FACTS AND CIRCUMSTANCES OF THE CASE, A FULL, NONCONSENSUAL, WARRANTLESS SEARCH AFTER IMPOUND OF THE CAMPER-TRUCK WAS UNREASONABLE IN SCOPE AND UNCONSTITUTIONAL.

Even if this Court upholds the Eighth Circuit's conclusion that the search of the truck complied with standard Minneapolis police impoundment procedures, the search was unreasonable in scope and violated Mr. Maier's constitutional rights. "Unconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practices." *State v. Jewell*, 338 So.2d 633, 640 (La. 1976). While this Court has recognized the constitutionality of routine inventory searches conducted without a warrant, *United States v. Chadwick*, 433 U.S. 1, 10 n. 5 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976), the Fourth Amendment remains relevant to this type of search. An inventory search must be reasonable within the meaning of the Fourth Amendment in light of the facts and circumstances of the particular case. *See South Dakota v. Opperman*, 428 U.S. at 375.

The Fourth Amendment's "reasonableness" standard requires that an inventory search be limited in scope. In *Opperman*, Mr. Chief Justice Burger stressed that adherence to standard police procedures ensures that intrusions are limited in scope to the extent necessary to carry out the caretaking function, 428 U.S. at 375, and specifically noted in validating the search of Opperman's vehicle that "[t]he inventory was not unreasonable in scope." *Id.* at 376 n. 10. In his concurring opinion, Mr. Justice Powell

also noted that "the *unrestrained* search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances." *Id.* at 379-80 (Powell, J., concurring; emphasis added); *accord, United States v. Edwards,* 577 F.2d 883, 893 (5th Cir.) (en banc) *cert. denied,* 439 U.S. 968 (1978); *United States v. Wilson,* 636 F.2d 1161, 1163 (8th Cir. 1980). *See also Terry v. Ohio,* 392 U.S.1, 18-19 (1968). To determine whether the scope of a search is reasonable, the governmental interests advanced by the inventory search must be weighed against the privacy interest invaded in light of the particular circumstances of the case. *United States vs. Wilson,* 636 F.2d at 1163.

Three governmental interests have been advanced to justify inventory searches:

(1) "The protection of the owner's property while it remains in police custody";

(2) "The protection of the police against claims or disputes over lost or stolen property"; and

(3) "The protection of the police from potential danger."

South Dakota v. Opperman, 428 U.S. at 369. In the instant case, the court of appeals concluded that the first of these interests justified a thorough search of the truck, including its locked camper/sleeper portion.

> After discovering the large amount of money in the cab, and in light of the absence of the owner, the need under *Opperman* for a reasonable police procedure for "protection of the owner's property" justified police in examining and making an inventory of the entire vehicle, including the locked camper, to ensure

> that any other valuable property would be recorded and kept safe.

United States v. Maier, 691 F.2d at 425. Petitioner contends that such a search was unreasonable in scope in light of his greater expectation of privacy in the locked rear compartments of the truck and in view of the particular facts of this case.

Warrantless examinations of automobiles have been upheld in circumstances under which a search of a home or office would be invalid. *South Dakota v. Opperman*, 428 U.S. at 367. The distinction rests on the principle that:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the respository of personal effects* . . . . It travels public thoroughfares where both its occupants and its contents are in plain view.

Id. at 368, *quoting Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (emphasis added). While this principle was applicable to the car in *Opperman* and justified the search of its cab and glove compartment, the same principle does not apply to the particular vehicle in the instant case and does not extend to a locked and concealed storage compartment such as that in the rear of Mr. Maier's truck.

In *United States v. Chadwick*, 433 U.S. 1 (1977), this Court distinguished the search of a locked footlocker in a car from the search of the automobile itself because the placing of personal effects in the footlocker manifested a greater expectation that the contents would remain free from public examination. 433 U.S. at 11. Like the footlocker in *Chadwick*, both rear compartments of the truck

driven by Maier were locked and the contents of the bottom compartment were concealed from outside viewing.

In *United States v. Wilson,* 636 F.2d 1161 (8th Cir. 1980), the Eighth Circuit extended *Chadwick* and held that an individual may justifiably have a greater expectation of privacy in the locked trunk of a car than in the interior of the vehicle. 636 F.2d at 1164. The Eighth Circuit found persuasive the analysis by Professor LaFave:

> The Court in *Chadwick* declared that a person's expectation of privacy in personal luggage is substantial as "luggage is intended as a repository of personal effects." But the trunk of a car is also intended as such a repository, and thus it is not apparent why, if "[b]y placing personal effects inside a double locked footlocker, respondents [in *Chadwick*] manifested an expectation that the contents would remain free from public examination," there is not the same expectation when effects are secured in the locked truck of a car. It will not suffice to point to what the Court in *Chadwick* called "the diminished expectation of privacy which surrounds the automobile," for the reasons given for that reduced expectation are inapplicable to the locked trunk—its contents are not in plain view, looking within the trunk would not "ordinarily be permissible in order to ensure the running safety of a car" and an impounded car and its contents may be adequately protected without intruding into a locked trunk.

636 F.2d at 164, *quoting* II LaFave, *Search and Seizure:* A Treatis on the Fourth Amendment, Section 7.2, pp. 540-41 (1978 and Supp. 1980). This argument applies with equal weight to the locked and concealed lower storage compartment of the truck driven by Mr. Maier. Once

Officers Rognlie and Carey looked in the window of the camper top, it was clear to them that there was a locked and concealed storage area below the plywood board which manifested an expectation that the personal effects therein would remain free from examination. Because the reasonableness of an inventory is tied to the specific areas searched, *South Dakota v. Opperman*, 428 U.S. at 376 n. 10, the analysis in *Opperman* will not lend support to a routine inventory search of the locked lower storage compartment of the truck driven by Mr. Maier.

Petitioner was entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate before his privacy interests in the contents of the locked and concealed storage area were invaded. *United States v. Chadwick*, 433 U.S. at 15-16. Moreover, while *Opperman* generally suggests that police officers may search any "windowed" compartments of a vehicle since the contents of these compartments are in plain view as the vehicle travels the streets, 428 U.S. at 368, such a principle does not apply to the camper top compartment of the truck driven by Mr. Maier. While the camper top section contained a window through which the police officers could view its contents, those contents and the circumstances surrounding their investigation provided notice to the officers that Mr. Maier possessed a greater expectation of privacy regarding this vehicle than is normally the case.

When Officers Rognlie and Carey commenced their investigation, it was two o'clock in the morning. They found Mr. Maier asleep in the truck, and the truck was pulled far off the thoroughfare. The officers established that there were no warrants out for Mr. Maier's arrest and that the truck was not stolen, and Mr Maier informed them that

the vehicle belonged to a friend but that he, Maier, had been using it for the previous five months. The truck had a "shell camper" attached in the rear, and when the officers looked through the back window, they could see sleeping bags in the camper/sleeper section. By looking through the rear window, the officers could also see that the truck had been further modified so as to create a concealed storage compartment under the sleeper section. While a motor vehicle "seldom serves as one's residence or as the repository of personal effects," *South Dakota v. Opperman*, 428 U.S. at 368, Officers Rognlie and Carey had sufficient information to realize that this truck functioned not simply as a mode of transportation, but as a temporary residence/sleeping compartment for Mr. Maier. [While Mr. Maier had been sleeping in the cab of the truck rather than the camper/sleeper portion, this simply may have been due to the weather on the night in question. The incident occurred on a night in early September, Mr. Maier was wearing only a pair of shorts and a tank top while he slept, and his feet were dangling out the open window of the cab when the police arrived (T. 5-6). Thus, Mr. Maier may have been avoiding the heat of the camper compartment on this particular night.] In this instance, the view through the rear window informed the officers that they were *not* at liberty to intrude upon this compartment of the vehicle. Under the facts and circumstances of this case, an inventory search, if appropriate at all, should have been limited to the cab of the vehicle.

Further facts of this case make the search of the locked rear compartment especially unreasonable. In *Opperman*, this Court partially justified the inventory search because "[t]he owner having left his car illegally parked for an

extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings." 428 U.S. at 375. In *United States v. Wilson*, 636 F.2d 1161 (1980), the Eighth Circuit invalidated a search in part because:

> Wilson was present during the search and capable of making other arrangements to safeguard his property. The police could have protected their interests as well as Wilson's without intruding into the privacy of the automobile trunk. The police, for example, could have asked for Wilson's consent to search the car, or in the alternative, requested that Wilson arrange to remove the car himself or to relieve police from liability for claims. In addition, the police could have inventoried the locked trunk as a single unit.

636 F.2d at 1165. In the case at bar, the Eighth Circuit distinguished *Wilson* by emphasizing that "Maier was alone without a valid driver's license, and no responsible person available to remove the truck from the sidewalk." 691 F.2d at 424. This conclusion reflects a misconstruction of both facts and law.

The record reflects that Mr. Maier himself was an available and responsible person who could have arranged to remove the truck or relieved the police from liability for claims. While Mr. Maier disclaimed ownership of the vehicle, he indicated to the police that he had been using the truck for the previous five months. Thus, Mr. Maier asserted a credible possessory interest and was certainly available to make arrangements for the removal of the vehicle from the sidewalk.

This Court has indicated that a possessory interest in an automobile is sufficient to raise an expectation of privacy.

Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); *Jones v. United States*, 362 U.S. 257 (1960). Officers Rognlie and Carey knew that the truck was not stolen, knew that there was no warrant out for Mr. Maier's arrest, and had no reason to question his possession of the truck. Under the circumstances, Mr. Maier's status was identical to that of the defendant in *Wilson* insofar as making arrangements for removal of the vehicle so as to ensure the security of its contents. *See United States v. Wilson*, 636 F.2d at 1165-66. The case at bar is indistinguishable on its facts from *Wilson*, and the district court was correct in concluding that the inventory search of the camper-truck driven by Mr. Maier was unreasonable under the Fourth Amendment.

CONCLUSION

For the reasons set forth above, this Court should declare the search of the truck driven by Petitioner violative of his constitutional rights and should reverse the judgment of the Eighth Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1218

United States of America,

Appellant,

v.

Jon Cary Maier,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 13, 1982

Filed: October 27, 1982

Before LAY, Chief Judge; BRIGHT and JOHN R. GIBSON, Circuit Judges.

BRIGHT, Circuit Judge.

The United States appeals from the grant of a motion by defendant-appellee Jon Cary Maier to suppress as evidence seven bales of marijuana and related materials seized by police during the search of the camper portion of a 1980 Chevrolet pickup truck and "topper" camper

unit. The grand jury charged Maier with possession with intent to distribute approximately 190 pounds of marijuana, in violation of 21 U.S.C. §841 (1976). Prior to trial, Maier moved to suppress the evidence on the grounds that it had been obtained by an unlawful search and seizure. A United States Magistrate recommended that the motion be granted. The district court adopted the magistrate's report in substance and entered an order of suppression. The Government appeals under 18 U.S.C. § 3731 (1976).

We reverse, and hold that the police discovered the marijuana while making a valid inventory of the contents of the vehicle, including the camper. Thus, the search and subsequent seizure of the items in question did not violate the defendant's rights under the fourth amendment.

I. *Background.*

At approximately 2:00 a.m., September 10, 1981, Minneapolis police officers Rognlie and Carey responded to a call to check a vehicle parked on a Minneapolis street. Upon arrival at the location of the vehicle, the officers found Maier asleep in the driver's seat of the pickup with his feet sticking out of the window on the driver's side of the truck. The truck was parked with its right front and right rear wheels on the sidewalk. In response to police questioning, Maier gave his name and date of birth, but stated that he carried no identification. The officers then ran a driver's license check and a warrant check, and learned that Maier had no warrants against him but that his driver's license had been suspended. Because of the license suspension, the police officers informed Maier he would not be allowed to drive the vehicle away, and that it

would be towed. The officers then took possession of the keys to the vehicle and directed Maier to depart on foot.

One of the officers then began to prepare an impound report while the other officer inspected the contents of the cab as part of "normal police procedure to inventory any valuable contents in the vehicle." The officer inspecting the cab, Officer Rognlie, observed a large leather bag in the front seat of the vehicle. At that time he called to Mr. Maier, who was about fifty-to-one hundred feet away, and inquired whether Maier owned the bag. Maier responded negatively. After Officer Rognlie moved the bag, he then found a second bag, which he described as a bank pouch, with a large number of $100 and $50 bills inside (a later count disclosed approximately $14,000 in currency). Officer Rognlie then ran after Maier and overtook him a block or so from the location of the truck. Rognlie later testified that when he caught up with Maier, he thought Maier was attempting to hide behind a wood fence. He asked Maier to whom the bag of money belonged, and Maier denied any knowledge of it. Maier stated that a friend, Mr. Wenzell, owned the truck but that Maier had been using it for the past five months. Rognlie then asked Maier to return with him to the truck.

The officers next proceeded to look into and unlock the rear "topper" of the camper portion of the truck. They observed several sleeping bags and a large sheet of plywood about eighteen inches above the floor that blocked further view of the camper floor. One of the officers testified that upon opening the "topper", he detected the smell of what he believed to be unburned marijuana, although he could not, in testimony, describe the smell or articulate why he identified the odor as that of maijuana. One of the

police officers then lowered the tailgate of the camper. Inside he saw a number of sealed opaque garbage bags visible under the plywood board. Officer Rognlie squeezed one of the garbage bags and felt its contents but did not open the bag.

The officers returned to their squad car and advised Maier that he was under arrest for "probable cause, narcotics." The police at the scene placed a radio call for a narcotics investigator. After his arrival, the investigator prepared an affidavit in support of an application for a search warrant based solely on the information supplied by the policeman first on the scene. The plice arranged to tow the truck to the police garage and there seized under the warrant approximately 190 pounds of marijuana located in the camper.

At the suppression hearing, Officer Rognlie testified that he had initiated the search of the pickup truck as an inventory search pursuant to normal police procedures used when impounding a vehicle. He testified further that he and his partner decided to impound the vehicle because Maier's driver's license had been suspended and no other person responsible for the vehicle was in the area. In addition, the prosecutor produced testimony from a police sergeant from the Minneapolis Police Department, who explained:

> Briefly, if a vehicle is found to be in violation and subject to tow, the vehicle will be searched in its entirety including any compartments or storage areas of the vehicle and towed. Failing to undertake such a search is a violation of department procedure and subjects are subject up to five days off without pay.

Finally, Officer Rognlie testified that he had opened the camper for self-protection, and to avoid the possibility of being shot by someone in the camper. Rognlie stated that he was aware that one week earlier a policeman had been shot by a man hiding in the back of a pickup truck.

In recommending that the motion to suppress be granted, the magistrate made findings, among others, that the fear for safety expressed by Officer Rognlie "was not reasonable in light of the circumstances," and further, that the officers' belief that they detected the smell of unburned marijuana was also not reasonable.

In adopting the magistrate's findings and opinion, the district court expressed the view that *South Dakota v. Opperman*, 428 U.S. 364 (1967), would permit the inventory search of the locked portion of a motor vehicle. Nevertheless, the district court believed that this court's opinion in *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980), required a determination that police had made an unlawful search and that the unlawful search tainted the warrant. We disagree. Upon careful review of the record, we believe the facts here are quite different than those presented in *Wilson*, and justify approving the search under *Opperman*.

II. *Discussion.*

The issue in this case focuses on whether the police had a right to extend an inventory search into the locked camper portion of the pickup truck unit. The Government contends the inventory search exception to the warrant requirement as discussed in *South Dakota v. Opperman*,

supra, justified a cursory search of the truck unit including the locked portion of the camper.[1]

The Supreme Court in *Opperman* indicated that once a vehicle is seized and legitimately taken into police custody, the routine practice of securing and inventorying its contents is justified as serving three distinct needs:

> [T]he protection of the owner's property while it remains in police custody * * *; the protection of the police against claims or disputes over lost or stolen property * * *; and the protection of the police from potential danger * * *. [428 U.S. at 369.]

The search in *Opperman*, however, extended only to the interior and unlocked glove compartment of the car.

In *United States v. Wilson*, 636 F.2d 1161 (9th Cir. 1980), we held that a legitimate seizure does not automatically justify an unlimited search of an automobile, and that the search must still be reasonable in light of the facts and circumstances of the particular case. 636 F.2d at 1163. In *Wilson*, police arrested the defendant for committing certain traffic violations. Because he was a nonresident, the officers took Wilson to the police station to post an appearance bond. Although they later determined that Wilson had not been intoxicated, the officers testified that they had his car towed because they believed he was not capable of driving it himself. Before it was towed, the officers searched both the interior and

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[1]The Government in its brief argues that the camper was not locked and that the inventory search in question here extended to an unlocked portion of the vehicle. The magistrate's findings, as well as the evidence, however, militate against that assertion.

Notwithstanding the efforts of the Government to sustain the search on several invalid grounds, we are satisfied from our examination of the record that the police entered the locked camper while conducting an appropriate inventory search.

locked trunk of the car, where they found incriminating evidence.

This court held that under the circumstances, the warrantless entry by police into the trunk was unjusitified and unlawful. We stated that

> the search was unreasonable in light of the individual's greater expectation of privacy in the locked trunk of *his* automobile and *in view of the particular facts of this case.* [636 F.2d at 1163 (emphasis added).]

We also noted that

> [a]lthough an individual may not reasonably expect the same degree of privacy in a car trunk as in a home or office, an individual may justifiably have a greater expectation of privacy in the locked trunk than in the interior of his car. [636 F.2d at 1164.]

In *Wilson*, the owner of the car was present but given no opportunity to arrange for the safekeeping of his belongings, to consent to the search, or to relieve the police from liability. This court observed that the inventory search in *Wilson*, unlike the search in *Opperman*, was not "prompted by the presence in plain view of a number of valuables inside the car." 636 F.2d at 1165 (*citing United States v. Opperman, supra*, 428 U.S. at 375-76). We also held that the search itself was unnecessary because the police intended to retain control of Wilson's vehicle for only a short period of time until Wilson could post an appearance bond. 636 F.2d at 1166.

Here, the police legitimately seized the pickup-camper in question. It was parked illegally in the early hours of

the morning. Maier was alone without a valid driver's license, and no responsible person was available to remove the truck from the sidewalk.[3]

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[3]Although Maier argues that the police did not comply with requirements of the Minneapolis ordinances for an inventory search, and the magistrate made findings consistent with Maier's contention, we disagree with that conclusion. From our examination of the record, the undisputed facts demonstrate the police directed the impoundment of the vehicle and were in the process of preparing an impoundment inventory when one of the officers discovered $14,000 in currency. Police Officer Rognlie testified:

A. The party was asked to get out of the cab of the truck, and we told him that because his license was under suspension, we were not going to let him drive the vehicle away. It would be towed. I removed the keys from the ignition of the truck, taking off the keys to the truck and handing him back his keys so he could get into his house or apartment or whatever he was in.
Q. Okay. What happened after that?
A. He jumped back in the truck, and he began looking for his keys on the ring, and I told him I had the keys to the pickup truck, and he was not going to be able to drive the truck away, and he better start walking or find some transportation to get himself home, as he was not going to able to take the truck home with him.
Q. What was the reason for that?
A. Under suspension. No one else in the vehicle that I could see in the cab, and we couldn't let him drive it away while he was under suspension.
Q. Under suspension. You mean his driver's license was suspended?
A. That's right.
Q. What happened after that?
A. Finally the party got out of the truck and started walking eastbound on 46th Street, and I yelled to my partner who was in the truck to start the tow-sheet or impound report, and I went up to the cab of the truck to look over the contents of the cab which is normal police procedure to inventory any vaulable contents in the vehicle.
Q. Also a normal police procedure, is there a requirement of the police department to do this?
A. Yes, sir. In our manual it's required.
Q. Okay. Do you know why you have this impound procedure?
A. Well, the towing by the City of Minneapolis is done by two different towing companies that are under contract, and they park vehicles in different areas, and the contents may sometimes turn up missing, and that's why we inventory them for—basically for safekeeping so it's noted on the sheet that it was there.

Thus, the record demonstrates that the initiation of the search into the vehicle was in conformity with the usual practice for inventory searches of a vehicle to be impounded.

After the police officers began the inventory search of the cab of the pickup, one of the policemen discovered a large amount of currency in the cab. The officer investigated further and learned that Maier did not own the truck and denied any interest in the large sum of money discovered in the cab. An officer looked through the rear window of the camper and observed other items of personal property in the camper area.

Here, unlike *Wilson*, no reason existed to limit the inventory search to the passenger area of the vehicle. After discovering the large amount of money in the cab, and in light of the absence of the owner, the need under *Opperman* for a reasonable police procedure for "protection of the owner's property" justified police in examining and making an inventory of the entire vehicle, including the locked camper, to assure that any other valuable property would be recorded and kept safe.

A police officer is justified in assuming that valuable items of personal property are stored in the camper unit of a vehicle impounded by the police when the officer finds $14,000 in currency in a pouch on the front seat of the vehicle and can see through a window that the camper unit contains some items of personal property. An inventory search of a locked camper unit under such circumstances is therefore proper. A police officer continues to act reasonably, moreover, when, after becoming suspicious of the possible illegal nature of the contents of the camper during the inventory search, he stops his search and initiates procedures leading to the issuance of a proper search warrant.

Accordingly, we reverse and remand for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America,

Plaintiff,

v.

Jon Cary Maier,

Defendant.

Memorandum Order

3-81 Cr. 83

This matter comes before the court upon defendant's motion for suppression of evidence. Magistrate Brian P. Short was designated by the court under 28 U.S.C. § 636 (b) to conduct a hearing, receive evidence, and prepare proposed findings of fact and a recommendation regarding the disposition of the motion.

The action is now before the court upon the Magistrate's Report and Recommendation. Specifically, the Magistrate recommended that the court grant defendant's motion for an order suppressing the following items of physical evidence: seven bales of marijuana, two plastic bags of marijuana, numerous empty bags, road atlas, mortar and pestal, scale parts, and miscellaneous keys. The government has filed objections to the Magistrate's recommendation.

This court accepts the Magistrate's findings of fact, except as to finding No. 19. Finding No. 19 reads as follows:

> The officers then opened the locked rear door of the camper and opened the sealed opaque bags, finding a quantity of vegetable matter they believed to be unburned marijuana. However, the officers could not describe the smell or articulate why the smell they noticed was marijuana.

Magistrate's Report and Recommendation at 3. Based upon its *de novo* review pursuant to 28 U.S.C. § 636(b) (1), the court finds that the officers did not open the sealed opaque garbage bags, but simply squeezed one of the bags found in the camper portion of the vehicle. Thus, Finding of Fact No. 19 is modified to read:

> The officers then opened the locked rear door of the camper, squeezed one of the sealed opaque garbage bags found therein, and smelled what they believed to be unburned marijuana. However, the officers could not describe the smell or articulate why the smell they noticed was marijuana.

Based upon its independent determination of all issues of law arising from the Magistrate's report, the court accepts the Magistrate's recommendation to suppress the above-mentioned items of physical evidence. The initial intrusion into the enclosed camper of the pickup was an illegal inventory search under the decision of *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980). In *Wilson*, the Eighth Circuit Court of Appeals held that "the routine search of a locked automobile trunk is unreasonable under the fourth amendment." 636 F.2d at 1165. This court, finding no facts in the present case to adequately distinguish it from *Wilson*, is therefore bound by the law of this circuit as set forth in *Wilson*.

It is the opinion of this couet that *South Dakota v. Opperman,* 428 U.S. 364, 376 (1976), would permit of an inventory search of a locked motor vehicle trunk and would also establish the reasonableness of a search such as the one occurring in this case. *Accord United States v. Martin,* 566 F.2d 1143 ((9th Cir. 1977), *United States v. Edwards,* 577 F.2d 883 (5th Cir.) (dictum). Such is not the view of the Court of Appeals of this circuit.

Accordingly,

IT IS ORDERED That the motion of defendant to suppress the physical evidence obtained as a result of search and seizure is granted, and such evidence is suppressed.

DATED: January 8, 1982.

/s/ Donald D. Alsop
United States District Judge

APPENDIX C

Report and Recommendation

CR 3-81-83

DANIEL W. SCHERMER, Esq., Assistant United States Attorney, for the United States.

MARC G. KURZMAN, Esq., for defendant.

Defendant is named in a one count indictment which charges that he possessed, with intent to distribute, approximately one hundred and ninety pounds of marijuana, in violation of 21 U.S.C. §841(a) (1). On September 28, 1981, defendant entered a plea of not guilty to the indictment. On October 5, 1981, defendant filed a motion to suppress certain physical evidence and a motion to dismiss the indictment. Those motions are the subject of this Report.

I. *Motion To Supress Evidence*

A hearing was held before the undersigned on October 26, 1981. Upon the evidence produced at the hearing and upon the post hearing briefs, the files and records herein, the court makes the following:

1. On September 10, 1981, at approximately 2:00 a.m. Minneapolis Police Officers Rognlie and Carey responded to a call to check a vehicle parked near 330 East 46th Street, Minneapolis, Minnesota.

2. When the officers arrived at 330 East 46th Street, they found defendant asleep in the drivers seat of a 1980 Chevrolet pickup truck, MN License No. YS41434. The box of this pickup was covered by a "topper."

3. The pickup was parked with its right wheels on the sidewalk.

4. In response to questions from the officers, defendant identified himself and gave his address and date of birth.

5. A driver's license check by Officer Carey disclosed that defendant's license was under suspension.

6. One of the officers determined that the vehicle was not stolen.

7. Officer Rognlie frisked defendant for weapons, found none and instructed him to leave the vehicle and walk home.

8. Defendant left the keys to the vehicle and walked away from the vehicle.

9. In view of all the facts-defendant's license was under suspension and he was the only person in the vehicle, the officers determined to impound the vehicle. However, the established Minneapolis Police Department procedures for impoundment of a vehicle were not followed.

10. Officer Rognlie entered and searched the unlocked cab compartment of the vehicle and found approximately $14,000 in currency.

11. After finding the currency, Officer Rognlie ran after the defendant and brought him back to the vehicle.

12. The defendant denied knowledge of the currency and stated that he had been using the truck, which was owned by a friend, for the previous five months.

13. Defendant was placed in the rear of a squad car while the officers requested a tow of the pickup.

14. The officers observed a plywood box or board in the locked camper portion of the vehicle about eighteen inches above the floor of the truck.

15. A number of sealed, opaque garbage bags were visable under the plywood board.

16. Officer Rognlie testified that he feared for his safety because of the possibility that a person was hiding underneath the board and behind the garbage bags. The officers had not seen anyone else around the truck. Further, the space underneath the plywood board was, at best, eighteen inches high.

17. The officers then unlocked and opened the window portion of the camper.

18. Upon opening the window, the officers testified that they detected the smell of what they believed was unburned marijuana.

19. The officers then opened the locked rear door of the camper and opened the sealed, opaque bags, finding a quantity of vegetable matter they believed to be unburned marijuana. However, the officers could not describe the smell or articulate why the smell they noticed was marijuana.

20. The officers returned to their squad car, advised defendant he was under arrest for "probable cause, narcotics," and called for a narcotics investigator.

21. When Sgt. John J. Boulger, a Minneapolis Narcotics Officer, arrived, Officers Rognlie and Carey told Boulger what they had found and how they came upon it.

22. Sgt. Boulger prepared an affidavit in support of an application for a search warrant based solely on the information received from Officers Rognlie and Carey.

23. A search warrant was issued by Hennepin County Municipal Court Judge Kenneth Gill, allowing a search of the truck and camper.

24. The search pursuant to the warrant disclosed the presence of a quantity of marijuana in the camper compartment of the vehicle.

25. Officer Rognlie's fear for his safety and the safety of his partner was not reasonable in light of the circumstances.

26. The officers' belief that they detected the smell of unburned marijuana was not reasonable.

REPORT

In the early morning of September 10, 1981, two Minneapolis police officers responded to a call to "check a slumper." The facts are outlined in the affidavit in support of the search warrant. The officers arrived at 330 East 46th Street and found defendant asleep in the cab of a 1980 Chevrolet pickup truck. The pickup was parked with its right wheels over the curb and near the sidewalk. The officers awoke defendant and requested identification. Defendant did not have any identification documents but told the officers his name and birth date. Record checks revealed that defendant's drivers license was suspended and that the pickup was not reported as missing or stolen.

The police searched defendant, found nothing, and told him that he would not be allowed to drive the pickup. The

officers took the keys to the pickup and defendant started to walk away from the scene.

The officers then started what was described as an inventory search of the cab portion of the vehicle. Officer Rognlie found an open pouch or purse containing a large quantity of currency. The officers called out to defendant and asked if he owned the purse. Defendant denied ownership of the purse and, when he was returned to the pickup, denied ownership of the currency.

Defendant was then detained in the officers' squad car and the officers continued their search. The box of the pickup was covered with what is known as a "topper." The locked topper was horizontally bisected by which was resting a box or board. about twelve to eighteen inches above the floor of the pickup box. The board was flush against the back of the cab and ran almost all the way to the tailgate of the truck. The entire enclosed area was locked and inaccessible from the cab or passenger portion of the pickup. Underneath the board, visible to the officers, were several opaque plastic garbage bags.

At the hearing, Officer Rognlie testified that he feared for his safety because of the possibility that a person could be hiding underneath the board and behind the bags. Even though several narrative reports of this search had been prepared, this testimony was the first time that safety concerns were mentioned. The officers fear for their safety does not appear in the officers' police reports or in the affidavit for the search warrant. Given the size of the area underneath the board, the fact that nothing unusual was observed during the course of the search, the defendant was not carrying any weapons and truck was not stolen, Officer Rognlie's fear for his safety was not reasonable.

Officer Rognlie also testified that he detected the odor of unburned marijuana when he opened the window portion of the camper. However, upon further examination, Officer Rognlie stated that he was unable to describe the smell and couldn't articulate how he was familiar with the smell of unburned marijuana, or even if it had a noticeable odor.

In the oral arguments and in the briefs, counsel have concentrated on the reasonableness of the intrusion into the locked camper portion of the vehicle. These arguments include discussion of warrantless inventory searches and warrantless searches for the purposes of insuring physical safety of the officers.

Defendant contends that the affidavit for the search warrant was based on information obtained by an illegal search. Defendant argues that because of this infirmity, the evidence seized pursuant to the warrant must be suppressed.

The Supreme Court has recognized the validity of inventory searches conducted without a warrant. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092 (1976). For a warrantless inventory search to be reasonable within the meaning of the Fourth Amendment, both the initial seizure and subsequent search of the vehicle must be legitimate. *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980).

In *Wilson*, the Court of Appeals for the Eighth Circuit held that the routine inventory search of a locked automobile trunk is unreasonable under the Fourth Amendment. Here as in *Wilson*, the defendant was present and able to make arrangements to safeguard his property. The police also could have inventoried the locked camper compart-

ment as a single unit. The Court in *Wilson* held that because of the higher expectation of privacy in a locked trunk of an automobile, the warrantless inventory search was illegal. There is no reason to distinguish the expectation of privacy that surrounds a locked car trunk from the similar expectations in the locked box portion of defendant's pickup.

Officer Rognlie's asserted fear for his safety was unreasonable and therefore cannot serve as a basis for a special justification for the intrusion into the enclosed box of the pickup. While concern for safety can be a legitimate governmental interest that will justify a warrantless search, *Opperman, supra, Cooper v. California,* 386 U.S. 58 (1967), Officer Rognlie's fears in this case were not reasonable under the circumstances.

Further, the government contends that defendant does not have standing to object to the search of a vehicle that defendant admits is not his. This argument is without merit. It is clear that while defendant did not own the pickup, he had control over the vehicle and its keys. The requisite privacy interests of defendant in the pickup and its contents is sufficient to give him standing to object to the search. See *Raskas v. United States,* 439 U.S. 128 (1978) (Powell, J., concurring opinion).

However, even assuming that the intial intrusion into the enclosed box of the pickup was reasonable because of an inventory search or because of the officers' fear for their safety, the warrantless opening of the opaque plastic bags was in violation of the Fourth Amendment.

The Supreme Court, in *Robbins v. California,* 101 S. Ct. 2841 (1981), held the warrantless search of sealed plastic wrapped bundles was improper. The Court held

that the container in *Robbins* could not be opened without a warrant even when the container was found during the course of a valid automobile search.

In Robbins, the driver of a station wagon was stopped for driving erratically. During the ensuing search of the passenger compartment of the car the police smelled the odor of burned marijuana and found a vial of liquid and a quantity of marijuana. After putting the driver into the squad car, the police initiated a search of the rear of the station wagon, lifting the tailgate and opening a recessed luggage compartment. In the compartment they found two packages wrapped in green plastic. The police then opened the packages and found that each contained fifteen pounds of marijuana.

The Supreme Court held that the warrantless opening of the containers violated the Fourth and Fourteenth Amendments. The Court held that, absent valid exceptions, a closed opaque container may not be opened without a warrant.

The government in this case has not put forth any valid exception to this general rule. The opening of the bags was without a warrant.

Because the evidence obtained as a result of the opening of the bags was used as a basis for the search warrant, the fruits of the search pursuant to that warrant must be suppressed. *See, United States v. Crews,* 100 S.Ct. 1244 (1980). Attached as Exhibit A is an inventory of the evidence which the court recommends be suppressed.

II. *Motion To Dismiss Indictment*

Defendant argues that marijuana is classified as a Schedule I substance in the Federal Controlled Substance

Act (CSA), 21 U.S.C. §801 *et seq*, and that this classification is irrational and arbitrary in violation of the Fifth Amendment.

Even assuming *arguendo*, that the data defendant cites regarding marijuana is correct, the classification of marijuana as a Schedule I substance is not arbitrary or irrational.

Similar constitutional challenges to the classification of cocaine as a Schedule II substance have met with consistent failure in the courts. Numerous cases hold that Congress has the authority to regulate and classify drugs. *See, e.g., United States v. Stieren*, 608 F.2d at 1136. Given the broad authority of Congress and relationship between the societal policies Congress seeks to implement and the statute, there is a rational legislative purpose to the classification of marijuana as a Schedule I substance.

Based upon the foregoing,

IT IS RECOMMENDED that the court deny defendant's motion to dismiss the indictment and grant defendant's motion for an order suppressing certain physical evidence.

DATED: November 19, 1981.

/s/ Brian P. Short
United States Magistrate

Pursuant to Local Rule 14C(b) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties, within 10 days, a writing which specifically identifies those portions of this Report to which objection is made and the basis for that objection.

Exhibit A

Inventory

1. Seven Bales of marijuana
2. Two plastic bags of marijuana
3. Numerous empty bags
4. Road Atlas
5. Mortar and pestel
6. Scale parts
7. Miscellaneous keys

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FILED
MAR 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1361

In the Supreme Court of the United States

OCTOBER TERM, 1982

JON CARY MAIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 8-27) that the court of appeals erred in reversing an order suppressing evidence obtained through an impoundment and inventory search of petitioner's camper-truck.

In an indictment returned in the United States District Court for the District of Minnesota, petitioner was charged with possession with intent to distribute of approximately 190 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1). The charge followed the seizure and inventory search, by two Minneapolis police officers, of a pickup truck with a "topper" camper unit. The officers had approached the truck because it was unlawfully parked on a Minneapolis street. Because petitioner's driver's license was under suspension and he accordingly could not lawfully drive it away, the officers impounded the truck and inventoried its contents in anticipation of its being towed away. The

officers discovered a leather pouch containing several thousand dollars in the cab of the truck; when they opened the camper section they saw several opaque plastic garbage bags and detected the odor of marijuana. The officers then arrested petitioner and secured a warrant to search the plastic bags which proved to contain bales of marijuana.

On petitioner's motion, a United States Magistrate recommended that the evidence be suppressed. The magistrate concluded that the officers had failed to comply with municipal regulations governing impoundment and inventory procedures and that the intrusion into the camper accordingly was improper. Alternatively, the magistrate recommended that the court find that the officers opened the plastic garbage bags without a warrant, effecting an unlawful search (Pet. App. C1-C9). Rejecting the magistrate's finding that the officers opened the bags without a warrant as erroneous, the district court adopted the remaining ground suggested for suppression (Pet. App. B1-B3). The court of appeals reversed, finding that the marijuana was properly discovered in the course of a valid seizure of the truck and a lawful inventory of its contents (Pet. App. A1-A10).

Petitioner contends that the court of appeals violated the "clearly erroneous" standard in rejecting the magistrate's conclusion, adopted by the district court, that the search did not conform to the city regulations governing impoundment and inventory; that the police officers' failure to comply with proper impoundment procedures rendered the search unlawful; and that search doctrines ordinarily applicable to automobiles do not apply to campers which may serve as temporary residences as well as vehicles.[1] Whatever

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[1] Petitioner raises this claim for the first time in his petition for a writ of certiorari.

the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied had the district court denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, he is convicted, he will then be able to present his contentions to this Court, together with any other claims he might have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

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[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.